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THE FORUM.

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EDITORIAL.

MOOT COURT.

A reader of the FORUM will notice that a large part of the space of the publication is devoted to reporting the cases of the Moot Court of the school. At the Dickinson School of Law particular stress is laid upon the work of the students in the Moot Court and the students themselves enter into the preparation and trial of the cases with an enthusiasm that always makes the case interesting and beneficial to all concerned. At no other Law School do we believe are better facilities offered for work along this line. Taking into consideration the cases tried in the courts of the two societies, very often as many as seven cases a week are tried in the various courts of the school. That this branch of the work is beneficial none will dispute and with the zeal with which it is entered into by the students and the spirit displayed at the trials, all the advantages that this method of instruction possesses are grasped by those participating in the trials. Many of the prominent jurists of the state have commented favorably on the work of our Moot Court as reported in the FORUM. The trials are open to the student body and whoever might wish to attend them. The Moot Court has been beneficial in giving the students a practical knowledge of the law and in teaching them to use the knowledge they acquire in the recitation room. We desire to call this part of the work to the attention of all who are contemplating a law school course, for we feel sure that at no other school will they find better Moot Court advantages. A splendid working library supplements the Moot Court work.

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The management of the FORUM requests the students to carefully examine the advertising columns of the FORUM when about to make any purchases. Those who have placed advertisements in the FORUM are all reliable business men and deserve the patronage of the student body inasmuch as they have patronized us. One good turn deserves another.

PRIZES.

The Dean of the Law School offers two prizes, consisting of useful law books. The first is to the Middler who shall furnish the best briefs in the cases tried in the moot court, for the January-June term, 1898. Those who intend to compete must signify this purpose at the beginning of the term. The briefs of the competitors will be preserved for comparison at the end of the term. The name of the captor of the prize will be announced at the commencement exercises.

A prize is offered by the dean to that member of the Junior class that shall do the best work in the law of Real Property.

Students intending to compete must state their purpose at the beginning of the term.

The prize offered by the Edward Thompson Company, consisting of the Encyclopedia of Pleading and Practice, in 15 to 18 volumes, will be awarded to the gentleman of the Middle class that produces the best essay on Sales of Land in the Orphans' Court exclusive of sales in partition. A competent and impartial judge or judges will be selected and the essays submitted to them. Competitors must notify the dean of their purpose to compete within two weeks after the opening of the next term. The essays must be delivered to the dean not later than May 1st, 1898.

THE SOCIETIES.

ALLISON SOCIETY.

The last month is one of which the members of the Allison Law society can look back upon with pride. At no time in its history has better work been done by its members. At its moot courts, it has had the services of three of the leading attorneys of the Cumberland county bar, and when the society received of two of them promises of lectures for the near future, the society felt itself fortunate indeed.

Arthur R. Rupley, Dist. Atty. for Cumberland county, sat as Judge in one of the cases, where the issue was the right of one who had purchased a ticket to a theater and had been ejected. Messrs. McMeans and Capwell represented the plaintiff, and Messrs. Landis and Freed appeared for the defendant. Mr. Rupley reserved his decision and in a few days handed down an elaborate opinion, elucidating the law of the case in every particular. Mr. Rupley's courtesies in his official capacity are much appreciated by the student body, and his promise of a lecture evidenced the interest he has taken in the school.

A question of the negligence of street railways was presided over by J. W. Wetzel, Esq. The case was ably argued for the plaintiff in error by Messrs. Daniels and Reese, while the interests of the defendant were looked after by Messrs. Charles Moyer and Charles Weeks. Mr. Wetzel is one of the leaders of the bar of the state, being an officer of the State Bar Association, and the society was fortunate to have as a Judge a railroad attorney who has tried many such cases. His decision rendered after the close of the argument was, in fact, an able lecture on the law of negligence. Mr. Wetzel's promise to deliver a lecture during the winter was the signal for an outburst of applause and enthusiasm.

The last case tried was presided over by W. W. Fletcher, Esq., of the Cumberland county bar. The question at issue was the validity of a labor claim. The plaintiff was represented by Messrs. W. K. Schissler and H. M. Sypherd, Messrs. J. O. Hass and J. P. Wood representing the defendant. Judge Fletcher reserved his decision. The thanks of the society was tendered him by President G. H. Moyer.

DICKINSON SOCIETY.

The Dickinson Law Society held a short meeting on November 19th. No programme had been arranged on account of the lecture delivered later in the evening by Judge McClure to the student body. The opinion of the court in the case tried at the preceding regular meeting was handed down before adjournment.

W. J. Shearer, Esq., well known as a member of the Cumberland county bar, lectured to the school at the invitation of the Dickinson Society on November 26th. His presentation of the principles and intricacies of "Criminal Practice" was illustrated by numerous cases drawn from his own celebrated practice. From beginning to end, Mr. Shearer emphasized the great duty of an attorney to his client in defending criminal prosecutions. After his delightful talk, on motion of the society, President Duffy extended the appreciative thanks of all present.

On December 3d, the regular order of society work was varied by the debate: "Resolved, That the Cause of the South was Justifiable." The able arguments of

Messrs. Pepper and Herr, for the affirmative, and Messrs. Laubenstein and Aubrey for the negative caused a division of opinion among the judges, Messrs. Sullivan and Miller deciding in favor of the latter, while Mr. Radle favored the former. After President Duffy had called on a number of members to speak *ex tempore* on subjects which he assigned, the meeting was adjourned.

At the regular meeting of the Dickinson Law Society on December 10th, thirty-five members being present, the following officers were elected: President, Thomas B. Pepper; Vice-President, Miss Julia Radle; Secretary, George W. Aubrey; Treasurer, Frank T. Morrow; Sergeant-at-Arms, Frank J. Laubenstein; Prothonotary, Llewellyn Hildreth; Recorder, William M. Flannigan; Register, Walter J. Henry; Justice of the Peace, B. Johnston McEwen; Sheriff, Origen G. McCandless; District Attorney, Isaiah Scheeline.

THE SCHOOL.

Christmas.

Vacation.

Farewell to Blackstone *et. al.* for three weeks.

D. Edward Long and D. D. Lewis have entered the Junior Class since the opening of the term. J. C. Smith, '97, has returned to school and is taking post graduate work.

S. B. Hare, '98, has been elected Vice President of the Dickinson College Athletic Association.

Frank B. Sellers, Jr., spent Thanksgiving in Mercersburg.

P. E. Radle, '98, and A. Frank John, '99, attended a meeting of Camp 15, Sons of Veterans at Harrisburg Nov. 23rd.

Among the students who accompanied the Dickinson foot-ball team on its victorious trip to Sunbury were Robert W. Irving, Merkel Landis, Frank B. Sellers, Jr., Eli Saulsbury and Blake Irvin.

The College Glee Club and Orchestra gave an entertainment before the Teacher's Institute, Tuesday evening, Nov. 30th, which was thoroughly enjoyed by the large audience present.

Within the past few weeks they have given concerts at Shippensburg and Greencastle. During the Christmas holidays a tour of the western part of the State will be made.

Last week, R. W. Capwell, '98, was confined to his room with illness for several days.

The members of the Junior class in Criminal Law have been assigned subjects by Judge Sadler, on which they are required to write theses, the excellence of which will determine in a measure the standing of each student in that branch of the law.

Examinations are now occupying the thought of the students to the exclusion of everything else. The monotonous drone of the grind is heard in the land.

Our President, Geo. Edward Reed, D.D., LL. D., has gone to Old Point Comfort for his health. We are glad to learn that he he is improving rapidly and expects soon to be able to resume his duties.

The Middle Class after a very exciting contest elected the following officers, Friday, Dec. 10:

President—Fred B. Moser.
Vice President—G. F. Vowinckle.
Secretary—Edwin G. Hutchinson.
Treasurer—A. T. Morgan.
Historian—Samuel B. Hare.
Sergeant-at-Arms—Claude L. Roth.

In order to bear public record to the esteem in which J. Herman Bosler, Esq., a notice of whose death appeared in our last issue, was held by the students of the Dickinson School of Law, the following resolution was adopted by the students and has been presented to the FORUM for publication:

Resolved, That in the death of J. Herman Bosler, Esq., one of the original incorporators, the Dickinson School of Law has lost a warm friend and one whose absence will be keenly felt. And we, the students

of the school do hereby desire to publicly express our appreciation of Mr. Bosler's assistance to the school, our high regard for his sterling character, our sincere regret at his death and our deep sympathy with his family upon their great affliction.

In the name of the school,

BLAKE IRVIN,
CHAS. E. DANIELS,
F. B. SELLERS, JR.

ALUMNI PERSONALS.

J. C. Walker, '97, was admitted to practice at the Bar of Newcastle County, Delaware.

* * *

Isaac I. Wingert, '97, has been admitted to the Franklin County Bar.

* * *

Rufus Lincoln, '96, G. Grant Clever, '95, and Henry W. Savidge, '97, helped cheer Dickinson on to victory in the great game with State, Thanksgiving Day, at Sunbury.

* * *

W. H. Stamey, '96, is interested in the establishment of silk mills at Reynoldsville, Pa.

* * *

J. S. Omwake, '96, who is progressing in the profession, is counsel for the Boro. of Shippensburg.

* * *

Saml. C. Boyer, '93, is superintending the construction of water works at Dushore, Pa.

* * *

J. Austin Schmidt, of Hazleton, a member of last year's Junior class, is now studying law in the offices of Wheaton, Darling and Woodward in Wilkes-Barre.

* * *

Geo. B. Somerville, '97, paid a short visit to Carlisle and the Law school recently, and gives a very favorable report of his progress since graduation.

* * *

We congratulate Rush Trescott, of the class of 1895, upon his appointment as Assistant District Attorney for the important county of Luzerne.

Charles W. Hamilton, Esq., of the class of 1897, a member of the Pittsburg bar, reports that he is "getting along very well." He has had something to keep him "busy nearly all the time."

THE MOOT COURT.

JOHN POWERS vs. WILLIAM SANDERSON.

Trespass.

ANDREW SHOENER, HUGH K. MILLER and ROBERT H. BARKER for the plaintiff.

An innkeeper is responsible for the property of his guest lost by acts of servants or other guests.—Houser v. Tully, 62 Pa. 92; Shultz v. Wall, 134 Pa. 262; Duncan v. Barr, 21 Pitt. L. J. 102; Sneider v. Geiss, 1 Yeates 34; Jeoffards v. Crump, 5 W. N. C. 10; Walsh v. Porterfield, 87 Pa. 376; Act May 7, 1855.

ROBERT W. IRVING, BLAKE IRVIN and ALFRED J. FEIGHT for defendant.

Landlord's liability does not extend to robbery.—2 Kent. Com., p. 593. Intoxication or any other contributory negligence is a good defence.—Walsh v. Porterfield, 87 Pa. 376; Shultz v. Wall, 134 Pa. 274; Purvis v. Coleman, 21 N. Y. 115; Bendetson v. French, 46 N. Y. 270; Cutler v. Bonney, 30 Mich. 260; Towanda Coal Co. v. Heeman, 86 Pa. 418.

STATEMENT OF CASE.

William Sanderson is the owner and keeper of a hotel located in the village of Newburg, Cumberland County. On the 14th day of July, 1897, James Powers from Baltimore, Maryland, registered as a guest at this hotel and engaged boarding and lodging for three weeks. He arrived about noon of the said day and was at once assigned to a room on the second floor. In the afternoon of that day he drank liquor to excess and became intoxicated. He retired to his room late that night and failed to lock the door. He had in his clothing one hundred dollars in money and a gold watch of the value of seventy-five dollars. During the night his room was entered and the money and watch taken. The thief was a servant of the proprietor of the hotel. Can Powers recover from Sanderson the loss he sustained, to wit, one hundred and seventy-five dollars.

PER CURIAM.

The defendant in this case is an innkeeper, and the plaintiff was his guest—the money and watch of the latter were stolen by the servants of the former. The keeper of a hotel or inn becomes the insurer of the goods of the guest to whom entertainment is given for reward.

"An innkeeper, like a common carrier, is an insurer of the goods of his guest."—2 Kent Com. 594. "He is practically an insurer of the safety of the property of a guest while he remains in his house."—Walsh v. Porterfield, 87 Pa. St. 376.

"An innkeeper is an insurer of the goods of his guest and is bound to keep them safe from burglars within and without."—Mateer v. Brown, 1 Bennett (Cal.) 229.

"The Common Law, on grounds of public policy, for the protection of travellers imposes an extraordinary liability upon an innkeeper for the goods of his guest." 11 A. & E. Ency. 51 p.

"An innkeeper holds out a general invitation to all travellers to come to his house and receives a reward for hospitality, and the Law in return imposes upon him corresponding duties, one of which is, to protect the property of those whom he receives as guests." Clute v. Wiggins, 14 Johns. 175.

"To render an innkeeper liable it is not necessary to prove that the goods of the guest were delivered to his special keeping nor to prove negligence on his part." Clute v. Wiggins, *supra.*

"The goods of the guest being within the inn the innkeeper will be charged with liability in case of loss." McDonald v. Edgerton, 5 Barb. 560; Norcross v. Norcross, 55 Me. 164; House v. Tully, 62 Pa. St. 92.

"An innkeeper is bound to exercise extraordinary diligence in preserving the property of his guests, committed to his care, when they have complied with all reasonable rules of the inn." Adams v. Clem, 41 Ga. 65-67.

"He can only absolve himself from liability for the loss of goods or property of his guest by showing affirmatively that the loss was not attributable to any fault or want of care on part of himself or his servants." Metcalf v. Hess, 14 Ill. 129.

"The proprietor of a tavern is bound even to see that those who enter it are properly protected from assaults or insults." Rommel v. Schambacher, 120 Pa. St. 582.

"The responsibility of the innkeeper extends to all his servants and domestics." Schultz v. Wall, 134 Pa. St. 273. "He is bound to provide honest and faithful servants." House v. Tully, *supra.*

"It is the duty of the innkeeper to provide honest servants, and keep honest inmates, and to exact care and vigilance over all persons who may come into his house." John v. Cardinal, 35 Wis. 118.

"The liability of the innkeeper is not diminished but rather increased by the fact that the guest is intoxicated to such a degree as not to be able to take care of himself."—Ruhnstein v. Cruikshanks, 54 Mich. 199.

Powers therefore had a right to expect that the defendant's employees were honest. He was under no obligation, in the absence of a request on the part of the defendant, to lock his door. The act of 7 May, 1855, P. L. 479, relating to innkeepers has no effect upon the present case. It is not referred to in the statement of facts and its protection can only be invoked by an innkeeper when it affirmatively appears that there has been a strict compliance with its provisions on his part, which requires the providing of a safe, the posting of notices, etc.

His intoxicated condition did not modify the duty or alter the liability of Sanderson. He had a right, drunk or sober, awake or sleeping, to be protected from pillage by his host and by his employees. Sanderson, the defendant, had invited Powers in common with the public in general, to come to his hotel and he has become an insurer for the safety of the property which he might have on his person. The defendant is the guarantor of the honesty of his employees. Any adjudicated cases which seem at variance with the conclusions arrived at by us will be found to be determinations where contentions arose between boarders and boarding-house keepers and not between innkeepers and guests.

The plaintiff is therefore entitled to recover in the present case and judgment is directed to be entered in his favor and

against the defendant, William Sanderson, for one hundred and seventy-five dollars and costs of suit.

W. F. SADLER, P. J.

FRANK G. DRAKE vs. GEORGE ANDREWS & CO.

Assumpsit.

BLAKE IRVIN and HUGH MILLER for the plaintiff.

1. Written agreement cannot be altered by parol.— Baugh's Exrs. v. White, 161 Pa. 638; Wodock v. Robbinson, 148 Pa. 503; N. & W. Branch R. R. v. Swank, 105 Pa. 561.

2. The transaction was legitimate.— Smith v. Bouvier, 70 Pa. 325; Maxton v. Gheen, 75 Pa. 166; Stewart v. Parnell, 147 Pa. 523; Brua's Appeal, 55 Pa. 299; Peters v. Grimm, 149 Pa. 163.

3. The principal can recover both margins and profits.—Peters v. Grim, 149 Pa. 163: Repplier v. Jacobs, 149 Pa. 167; McNaughton v. Haldeman, 160 Pa. 144; Hart v. Girard Bor., 63 Pa. 388; Evans on Principal and Agent, 287; Huffcut on Agency, 117.

ROBT. W. IRVING, ANDREW S. SHOENER and ROBT. H. BARKER for the defendant.

1. Drake acted as principal and not as agent.—Ruchizky v. De Haven, 97 Pa. 202.

2. If delivery was not intended, plaintiff cannot recover.—Peters v. Grim, 149 Pa. 163; Fareira v. Gabell, 89 Pa. 89; Waugh v. Beck, 114 Pa. 422; Maxton v. Gheen, 75 Pa. 166.

PER CURIAM.

It appears by the case, as stated, that the defendants gave to the plaintiff a receipt for the money paid them by the latter, at the head of which was the printed statement that "actual delivery is in all cases understood." Conceding, that in the absence of any explanation, this might have been properly regarded as evidence that a contract for the actual delivery of the grain was contemplated and entered into, yet we have the admission of both parties to the contract that such was not their understanding. "That neither of them had any such intention."

The present case does not involve such a contention as would have arisen, had it been insisted, on the one hand, that the writing contained the only and full understanding of the parties, and urged on the other hand that it had been executed by accident or mistake or through fraudulent representations.

It was not the intention of the plaintiff to actually buy nor of the defendants to actually sell any grain. The dealings were between the plaintiff and the defendants alone. "The parties were not dealing in stocks (wheat) but in margins." Ruchizky v. De Haven, 97 Pa. 209.

"The form of a wagering contract is immaterial if both parties understand that one shall not be bound to deliver and the other not bound to take and pay the price, but that a settlement is to be made between the contract price and the market price." Harvey *et al.* v. Merrill *et al.*, 5 L. R. A. 200.

"A transaction in stocks by way of margin; settlement of differences and payment of gain or loss, without intending to deliver the stocks, is a mere wager, which the law does not sanction and will not carry into effect." Waugh v. Beck, 114 P. S. 422.

"A contract of sale, for future delivery is binding, *unless* shown that both parties intended that there should be no delivery but only a settlement of differences between the contract and market price." North v. Phillips, 89 P. S. 256; Dickson v. Thomas, 97 P. S. 288. When there is any dispute about the facts, "it is the province of the jury to determine the nature of the transaction and to ascertain the intention of the parties." Fareira v. Gabell, 89 Pa. 89; Peters v. Grim, 149 Pa. 163. In the case stated however the intention of the parties appears as one of the admitted facts. While the later cases of Peter v. Grim *supra*, Repplier v. Jacobs, 149 Pa. 167; McNaughton & Co. v. Haldeman, 160 Pa. 144; Hopkins v. O'Kane, 169 Pa. 478, Champlin v. Smith, 164 Pa. 481, and Albertson v. Laughlin, 173 Pa. 525, seem to somewhat modify the rulings in Fareira v. Gabell, *supra*, and Ruchizky v. De Haven, *supra*, holding that "a purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction," yet the doctrine is strictly adhered to, that if there was not under any circumstances to be a delivery, as part of, and completing a purchase, then the transaction is a mere

wager" and the law will not enforce such contracts.

If Andrews & Co. had in fact been the mere agents of the plaintiff and as such had dealt with other parties and had closed up transactions and reaped profits which had been paid over to them, they could not withhold the moneys from the plaintiff on the ground that the transaction was unlawful and the plaintiff would be entitled to recover the profits so received and held by them.—Norton v. Blinn, 39 Oh. St. 145; Brooks v. Martin, 59 U. S. 70.

But while the plaintiff is not entitled to recover any of the profits of the transaction from the defendants he is entitled to recover the margins which he deposited with them. The transaction having been closed they are in law bound to pay him the margin, one hundred dollars. This is expressly ruled by our supreme court in Peters v. Grim and Repplier v. Jacobs, *supra*. And now Dec. 2, 1897, judgment is hereby entered in favor of the plaintiff and against the defendants for the sum of one hundred dollars and costs of suit.

W. F. SADLER, P. J.

FREDERICK CRITTENDEN vs. FARMERS' INS. CO.

Assumpsit.

FREDERICK C. MILLER and ALBERT T. MORGAN for plaintiff.

1. Since the agent was aware of the circumstances, the company will be estopped from denying that Crittenden has an insurable interest.—Bennet v. North British Ins. Co., 81 N. Y. 273.

2. The contractual relations entered into by Crittenden give him an insurable interest.—Dohn v. Stork Ins. Co., 5 Lans. 275; McGivney v. Phœnix Fire Ins. Co., 1 Wend. 85; Putnam v. Mercantile Ins. Co., 5 Metc. 386.

The building of the house on a freehold estate causes it to become a part of the realty.—Tiedman on R. P., p. 84; Carver v. Gough, 153 Pa., 225; Westgate v. Nixon, 128 Mass. 304.

This transaction is a sale.—Tiedman on Sales, §87.

If plaintiff's interest had been fairly made known to the agent at the time the contract was made, he can maintain an action.—Fenn v. New Orleans Ins. Co., 53 Ga. 578; Caston v. Monmouth Mut. Fire Ins. Co., 54 Me. 170.

W. LLOYD SNYDER and A. M. DEVALL for defendant.

1. A policy of insurance obtained upon a subject in which the insured has no interest, is void.—Sweeney v. Franklin Ins. Co., 20 Pa. 337; Fowler v. N. Y. Ins. Co., 26 N. Y. 422.

In this case, the *builder* has an insurable interest.—Franklin Ins. Co. v. Coate, 14 Mo. 285; Protection Ins. Co. v. Hall, 15 (B) Mon. (Ky.) 411.

2. There must be a pecuniary interest in the thing insured.—Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47; Tice v. Zinsser, 76 N. Y. 549.

STATEMENT OF THE CASE.

Crittenden owning a lot contracted with Joab Martin to erect a house upon it for $4,000.00. No part of this sum was to be paid until the completion of the house, to the satisfaction of an architect. Shortly after the construction commenced Crittenden procured an insurance from the defendant up to the sum of $3,000.00. The damage was to be ascertained according to the actual value of the property at the time of any fire. After the house was up, but before its completion it was destroyed by a fire which devastated the neighborhood. The loss thus occasioned amounted to $3,400. Immediately after the fire Joab Martin began the process of re-erection, which was continuing when the action was brought by Crittenden.

OPINION OF THE COURT.

There are two facts which seem to have awakened doubt of the right of Crittenden to recover upon his policy of insurance. (1) The policy was taken out upon a house which was at the time inchoate, but as to which, at every stage even to completion, it was intended to be an indemnity, and (2) the plaintiff was to pay no money to Martin, the contractor, until the house was finished, and therefore, it is said, its destruction could be no pecuniary detriment to Crittenden.

(1.) The contract had been made for the erection of the house and its erection had recently begun, when the policy was obtained. The house was about to come into existence. We think it was a proper subject of insurance. "Floating policies," "shifting risks" are well known to the law. Policies may be taken out that insure, not simply goods owned by the assured at the time, but that shall be owned, during the period of the policy. 7 Am. & Eng. Encyc. 1008. In Ellmaker v. Frank-

lin Fire Ins. Co., 5 Pa. 133, a policy was taken out on a house undergoing construction. A ship on the stocks was, in Hood v. Manhattan Fire Ins. Co., 11 N. Y. 532, insured, the policy attaching to it, at every stage of its progress towards completion. It has never been doubted so far as we are at present advised, that if a house is insured, and subsequently, is increased in value by improvement, the damage to those portions of the house which were added since the taking out of the insurance, would be covered by it. The builder has an insurable interest in the house he is building. 1 Biddle, Ins. 158; 11 Am. & Eng. Encyc. 317, and the policy though it attaches when but a few dollars have been expended upon it will continue to attach to it, and to all the additions, until it has cost thousands. We see nothing to prevent recovery on the policy in the circumstance that it was taken when the erection of the house had barely started.

(2.) Difficulty seems to be felt, on the part of the defendant, because the house was erected at the exclusive cost of the contractor, Martin, until completed to the satisfaction of an architect. It follows, it is contended, that if the building before completion was destroyed by fire, the loss would fall, not on Crittenden, but on Martin. It cannot be doubted that, had such fire occurred, Martin would have been bound to rebuild for the contract price, and *toties quoties*. The owner could not be compelled to pay anything to him, until the house was fully built. Tompkins v. Dudley, 25 N. Y. 272; Superintendent of Public Schools v. Bennett, 27 N. J. L. 513; 1 Biddle, Ins. 159.

But does it follow that Crittenden could suffer no loss from the destruction of the building? We think not. The value of the building is not necessarily equivalent to the contract price. It may exceed that price. The house may be worth more to Crittenden than the money that he must pay. Retention of the money would then not be as advantageous to him as parting with it and gaining the house. But, it may be said, he may not only retain the money, if the house is not built, but recover damages for Martin's failure to build it, and the right persists, even after the destruction of the house by fire. But, Martin's continued solvency is not certain. It might be more beneficial to Crittenden to have the house than to have the personal responsibility only of Martin for damages. Again, Martin, after making some progress with the building, might abandon it. In that case, Crittenden would own, without paying for it, whatever had been attached to his soil. This possibility had a value, which was insurable. Foley v. Manufacturers Fire Ins. Co., 152 N. Y. 131.

It may be urged that, if Crittenden may recover the insurance, and, at the same time, compel Martin to re-construct the house, he profits by the fire. That result would follow, unless in some way, Martin should be subrogated to his right, as to the insurance money if he should re-erect the building. We do not decide that he might be thus subrogated. It would not follow, if he could not be, that Crittenden could not recover the insurance money. It has been often decided that the reception by one who has been injured by X's negligence, of indemnity on an accident policy, is no bar to recovery from X, for his negligence. So recovery from X could not bar a recovery on the policy. 152 N. Y. 131.

We are of opinion therefore, that the plaintiff is entitled to recover from the defendant $3,000 with interest.

GEORGE KEMP vs. JOHN HEYMAN.

Assumpsit.

J. AUSTIN SULLIVAN and FRED. B. MOSER for the plaintiff.

1. An accommodation party paying the instrument at maturity is entitled to be subrogated to all the rights and securities against the party accommodated, possessed by the holder of the paper who has received payment.—Vol. 1 Am. & Eng. Ency. of Law, 2 Ed. 371; Stevenson v. Anston, 3 Met. 474; Nat. Bank v. Shields, 55 Hun. 274; Nat. Bank v. Wood, 71 N. Y. 405; Lenox v. Bont. 3 Wheat. 520 Moeser v. Cuswell, 150 Pa. 409; Benedict v. DeGroot, 1 Alb. App. Dec. 532.

2. In a suit by the holder against the maker of a negotiable note, the plaintiff cannot be called on to prove the consideration unless fraud be shown.—Brown v. Street, 6 W. & S. 221; Knight v. Pugh, 4 W. & S. 445.

PHILIP E. RADLE and SAMUEL B. HARE for the defendant.

Valuable consideration is essential to every contract.—Clark on Contracts, 153. The consideration of a promissory note may be inquired into.—Clement v. Reppard, 15 Pa. 111; Wheelock v. Leonard, 20 Pa. 440. No liability, according to the doctrine of Altoona Bank v. Dunn, 151 Pa. 228.

OPINION OF THE COURT.

Heyman owed $794 to Charles Kemp, brother of George Kemp. George, desiring to procure payment, spoke with Heyman and asked him why he did not pay Charles. Heyman said he was unable to raise the money. George Kemp then said that if Heyman would make a note, he, George, would endorse it, and that the money could be thereon obtained from a bank. He also said he would give to Heyman an old wagon worth $18. Heyman made the note, payable to George Kemp, who endorsed it to the discounting bank. The money thus obtained was paid to Charles Kemp. Subsequently George Kemp had to pay the note to the bank. He never delivered the wagon to Heyman. As payee he sues Heyman, as maker of the note.

The liability of Heyman to Kemp is that of the maker of a promissory note to the payee. *Prima facie*, the payee may compel the maker to pay according to the terms of the promise. The duty of paying is denied by Heyman because of the alleged absence of a consideration. Was there a consideration? The note was made as an instrument for procuring money for Heyman. It was drawn by him, endorsed by Kemp, and by Kemp handed back to Heyman. In Heyman's hands it did not represent any contract. But Heyman had it discounted by the bank. In the money received from the bank, was the considertion for Heyman's promise as maker and of Kemp's promise as endorser. That act subjected Kemp to a legal liability toward the bank, and this liability was consideration for the promise of Heyman to pay him. Had there been no consideration before, the payment of the note by Kemp would have furnished one for the promise of Heyman to him.

But, there were two inducements to Heyman to make the note. One, evidently was, the obtaining of money on it with which to extinguish a debt to Charles Kemp. The other was the obtaining of a wagon from George. The latter alone, would not have led to the making of the note, nor probably, would the former. But, the wagon has not been delivered by Kemp, the plaintiff. We are to consider (1) whether his promise to deliver it was binding on him, and (2) what if binding, would be the consequence of the non-performance of it upon his right to recover upon the note.

1. If the promise was not binding, it was not binding because of a want of consideration for it. No other defect is suggested. It is urged that the act of Heyman, which that promise induced, was an act which he was already legally bound to perform. He owed the debt to Charles Kemp. The promise of George Kemp was made to induce him to pay it. He ought to have paid it without the promise. It is probably true that a promise made by A to B, to induce B, and in fact inducing B, to discharge a debt to C, finds no consideration in the mere payment to C. "A promise to do, (and consequently, the doing,) what one is already bound to do is not a consideration." 3 Am. and Eng. Ency. of Law, (1st Ed.) 834; Clark Contracts, 189. If Heyman had simply promised to pay, or had simply paid Charles Kemp, doubtless George Kemp's promise to give him a wagon would have been without consideration. But Heyman did more than this. He put himself under contractual obligations toward both George Kemp and the discounting bank. It is true that he did this, as a means of procuring the money with which to pay his debt. He was under no legal duty to resort to this means. He chose to promise to pay George Kemp $794, if by Kemp's endorsement, he should procure $794 from a bank, if Kemp should have to pay the bank, and if Kemp would give him the wagon. Kemp agreed to give both the endorsement and the wagon. We think the assumption of the obligation of paying the bank, or George Kemp, consideration enough for the promise of the wagon. The fact that the ultimate object of the transaction was the discharge of Heyman's debt, and was, in a sense a benefit to him, does not take from the involution of himself in obligations toward the bank and George Kemp, the capacity to serve as a

consideration. Clark Cont. 150. We are not able to adopt the view referred in Avend v. Smith, 151 N. Y. 502, that in giving the note Heyman did no more than his duty, and therefore that he furnished thereby no consideration for George Kemp's promise.

2. George Kemp's promise to deliver the wagon was binding upon him. What is the consequence of his failure to deliver it? Plainly the defendant is entitled to deduct from the amount due on the note, the value of the wagon, in respect to which he has been disappointed. Judgment therefore will be entered for the face of the note, with interest, less $18.

JAMES ROBERTS vs. RAILROAD COMPANY.

Trespass.

WM. A. JORDAN and FRANK T. MORROW for plaintiff.

1. A. R. R. Co. is responsible for negligence, carelessness and want of skill of its servants. P. R. R. Co. v. Keeler, 67 Pa. 300; P. R. R. Co. v. Vandiver, 42 Pa. 365. A railroad company is bound to use the greatest care and diligence with respect to passengers. Mirer v. Pa. R. R. Co., 64 Pa. 225; N. Y. L. E. and W. R. R. Co. v. Dougherty, 11 W. N. C. 437. The defendant was negligent. Pa. R. R. Co. v. Lyons, 129 Pa. 113; Pa. R. R. Co. v. Peters, 116 Pa. 206; Del. & Hudson Canal Co. v. Webster, 18 W. N. C. 339. The brakeman's act conduced to Mr. Roberts' injury. R. R. Co. v. Alfard, 128 Pa. 146. The plaintiff was a passenger. Am. & Eng. Enc. of Law, pages 743 & 744. Plaintiff was not negligent. Johnston v. West Chester & Phila. R. R. Co. 70 Pa. 357; Salter v. Utica & Black River R. R. Co., 88 N. Y. 49; P. R. R. Co. v. Kilgore, 32 Pa. 292.

G. FRED VOWINCKEL for defendant.

The defendant company was not negligent. R. R. Co. v. Aspell, 23 Pa. 147; Del., L. & W. R. R. Co. v. A. E. Cadow, 120 Pa. 559; Hagan v. Phila. & Grays Ferry Ry. Co., 10 W. N. C. 360. The company is responsible only for the negligence of its servants in the scope of their duties. Mary Isaacs v. Third Ave. R. R. Co., 47 N. Y. 122. The plaintiff was negligent. Bradwell v. Pittsburg, etc. Pass. Ry. Co. 139 Pa. 404; Hestonville, Mantua and Fairmount P. R. R. Co. v. Gray, 3 W. N. C. 421; Bacon v. R. R. R. Co., 143 Pa. 14; Catawissa R. R. Co. v. Armstrong, 49 Pa. 186; Butler v. R. R. Co., 126 Pa. 160.

STATEMENT OF THE CASE.

On the morning of July 12th at 10 o'clock, Roberts was at a station of the defendant intending to take the train shortly to arrive. At the approach of the train, he descended to the ground, standing close to the track. The train did not stop but simply slowed, and conductor, seeing Roberts, shouted to him to get on if he wanted to, that the train would not stop. It was then going at the rate of from one to two miles per hour. There were three steps to the car. Roberts gained the lowest step and advanced to the platform, his satchel, weighing 25 pounds, in his left hand, and his right grasping the guard rail. While there he was struck by a brakeman who was hurrying from the preceding car, and at the same time the car gave a sudden lurch or jerk. He reeled in consequence, lost his hold, and fell from the car, suffering a severe accident.

Defendants request the court to instruct the jury:

1. Boarding train in motion is negligence *per se*.

2. The brakeman's act not imputable to defendant.

3. There was no negligence by defendant.

CHARGE OF THE COURT.

Gentlemen of the Jury :—

The defendant requests us to instruct you (1) that the boarding of the train by Roberts was negligence *per se*; (2) that the brakeman's act was not imputable to the defendant, and (3) that the evidence does not disclose any negligence by the defendant.

(1.) There is an infinite number of degrees of motion. Some are so slight, that the boarding of a train when in such motion, could not be appreciably more hazardous than would boarding it, if at rest. It is true that in Bacon v. R. R. Co., 143 Pa. 14, the attempt to board a train that was moving at the rate of three to four, or four to five miles per hour was denounced as negligence *per se;* and in Sharrar v. Paxson, 171 Pa. 26, Mr. Justice McCollins declares that "the attempt to board a moving train is undoubtedly a negligent and hazardous act." It is impossible however, to hold that the mere fact that a train is in any motion, however slow, would, without regard to other cir-

cumstances, make the effort to mount it negligent or reckless. "A car," says Clark J., "may be moving so slowly that there would be no apparent danger whatever in attempting to enter it; so slowly that a person of reasonable prudence, in the exercise of ordinary care, would not hesitate to make the effort. It would be a hard rule that would hold a passenger guilty of culpable contributory negligence in such a case." Stager v. Passenger Railway Co., 119 Pa. 70; Jagger v. Railway Co., 180 Pa. 436. In Johnson v. W. C. & Phila. R. R. Co., 70 Pa. 357, although the train was in perceptible motion when the passenger, who was encumbered with a valise, a bundle, and a coil of pipes, attempted to board it, the decision whether he was negligent was referred to the jury. In Disher v. Long Island R. R. Co., 151 N. Y. 424, the effort to get on a car moving at the rate of from two to three miles per hour was held not to be negligent *per se*, in the absence of circumstances making the act specially dangerous.—*Cf.* Briggs v. Union Street Railway, 148 Mass. 72; Kansas, etc. R. R. Co. v. Dorough, 72 Texas 108; Foreman v. Mo. Pacific R. R. Co., 4 Texas Civil App. 54.

But, whether the act of mounting the train while it was in motion was or was not negligent is immaterial unless that act caused the accident for the damage from which the plaintiff sues.—Creed v. Pa. R. R. Co., 86 Pa. 139; Passenger Railway Co. v. Boudron, 92 Pa. 475; Sharrar v. Paxson, 171 Pa. 26. Roberts had not only succeeded in gaining the lowest step, but he had got upon the platform. He then received a blow from the brakeman, and at the same time the car gave a sudden lurch or jerk. His fall was caused by the push and the lurch, and not by the previous and completed act of getting on the car. In Sharrar v. Paxson, *supra*, Sharrar had succeeded in getting on the step of the moving car, when he was pushed off by the brakeman. His fall was not the consequence of the rash act of mounting the car, but of the brakeman's push.

It may be said that it was the position of Roberts on the platform of the car, while in motion, that contributed to the accident, and that it was negligent in him to be in this position. It is competent for the jury to determine that such a position implies negligence of Roberts, and from that point of view, it is necessary to consider whether the position on the platform can properly be deemed the cause of the accident. Had he been inside the car, it is evident that this accident would not have happened. What then? Is the position the cause of the accident? It is rather a condition of the accident. It is not the cause thereof. In Passenger Railway Co. v. Boudron, 92 Pa. 475, a passenger was negligently riding on the rear platform of a street car. He was run into by the pole of a following car, owing to the carelessness of its driver. The standing on the platform was a condition, but not a contributory cause of the accident. Certain risks a passenger takes on himself, if he stands on the platform, and in respect to these risks, he is negligent. Others, he does not take on himself, and with respect to them, it is not negligent to stand on the platform. If he were not on the steps or platform, he could not be pushed off by the brakeman; but he does not, by standing on the steps or platform, assume the risk of being pushed off voluntarily by the brakeman. If he is pushed off by that servant he may recover damages. Sharrar v. Paxson, 171 Pa. 26. We do not think he assumes the risk of being pushed off by the brakeman negligently. It is not against such a probability that it is incumbent on him to take the precaution of avoiding the platform.

2. The defendant denies the imputability of the negligent act of the brakeman to it. We do not think that the imputability can be doubted. The company acts through its servants. The negligent act may be that of an engineer, Childs v. Pa. R. R., 150 Pa. 73; Ellis v. Lake Shore R. R. 138 Pa. 506, or conductor, or brakeman, Sharrar v. Parson, 171 Pa. 26; McCloskey v. R. R. Co. 156 Pa. 254, (coupling cars,) Pa. R. R. v. Horst, 110 Pa 226; or driver of another car; Passenger Railway v. Boudron, 92 Pa. 475; but in all such cases the company is responsible for the act.

3. The defendant denies that the evidence would justify an inference of its negligence. From the fact that the car lurched or jerked, no inference of negli-

gence could be made. The act of the brakeman in striking the body of the plaintiff with the force with which he is shown to have struck him, is, unless explained consistently with care, sufficient evidence of negligence.

We shall submit to you therefore the question of the care or negligence of the defendant. Although the act of the plaintiff in mounting the train while it was in motion, might be considered by you to be negligent, yet, as we fail to see any causal relation between that act and the accident, we decline either to pronounce as matter of law, or to permit you to find, as matter of fact, that the plaintiff's negligence contributed to the accident.

REMAK vs. QUILTER.

Ejectment.

SHISSLER and WETZEL attorneys for plaintiff cited: A devise to a person for the term of his life, and after to his children and their heirs in equal parts; or if he should die without issue, then over in fee creates an interest for life with alternate remainder. 4 Kent 200; Tied. on Real Prop. §415; Stewart v. Neely, 139 Pa. 139; Waddel v. Pattem, 5 Rawle 531; Way v. Gent; 14 S. & R. 40.

Under modern Law a contingent remainder may be assigned. Harris v. McElroy, 45 Pa. 220; Pomeroy's Eq. Juri., Vol. 3, Sec. 1271; Bayler v. Commonwealth, 40 Pa. 37.

Strangers to an instrument can not take advantage of the recitals contained therein. A. & Eng. Ency. of Law, Vol. 20, p. 465; Surdertin v. Struther, 45 Pa. 411; Kirkpatrick v. Heydrick, 161 Pa. 447; Allen v. Allen, 45 Pa. 468.

Where the law requires a transaction to be by writing, it cannot be proved by other evidence. Greenleaf on Evid., Vol. 1, No. 86; Statute of Frauds, Act 22 April, 1856, No. 4, P. L. 533.

A recital in a deed to a third person is not such a memorandum as will satisfy the term of the Statute. Allen v. Allen, 45 Pa. 468.

CLAUDE L. ROTH and WALTER G. TREIBLY for the defendant.

1. The plaintiff has no title, legal or equitable, under deed from George Stein.—Stewart *et al.* v. Neely, 139 Pa. 309; Waters' Appeal, 35 Pa. 523.

2. Defendant has title by deed from Samuel Stein to Josiah Mintor and subsequent conveyances.—Balliets' Appeal, 14 Pa. 451; *in re* Nan Mickel, 14 Johns. 324; Mullaly v. Holden, 123 Mass. 583; Peacock v. Purvis, 2 Brod. and Bing. 362; Horan v. Weiler, 41 Pa. 470; U. S. Bank v. Dandridge, 12 Wheat. 69.

3. Defendant claims title under the Statute of Limitation.—Innis v. Campbell, 1 Rawle 373; Irwin v. Patchen, 164 Pa. 51; Strinpfler v. Roberts, 18 Pa. 283; Trickett on Limitations, Sec. 15, page 12; Sec. 52, page 66; Sec. 107, page 141; Leport v. Todd, 32 N. J. L., 124; Brown v. King and another, 46 Mass. 173; Broad Top Coal Co. v. Riddlesburg Coal Co., 65 Pa. 435; Altemus v. Long, 4 Pa. 254.

STATEMENT OF THE CASE.

On 3rd December, 1847, Augustus Stein died, leaving a will which *inter alia*, devised "all that certain tract of land (— —) to my son Samuel for the term of his life, and after his death to his children and their heirs in equal parts; if he should die without issue, then to my son George, his heirs and assigns."

Samuel died in 1857, August 3rd, never having been married. On January 14, 1853, he conveyed a portion of this tract to Josiah Mintor in fee. On September 11, 1850, George Stein conveyed the whole tract to William Armstrong. In 1856, April 16th, Armstrong ascertaining that Samuel Stein claimed to have owned the land in fee by some species of contract with his father, procured from him a deed for the land in fee not knowing of his previous conveyance of a portion of the tract to Mintor. This deed recited that "Whereas Augustus Stein did by will of 3rd December, 1847, devise the hereinafter described tract of land to Samuel Stein for life; and whereas the said Augustus Stein had during his lifetime advanced and transferred the said tract to the said Samuel, for natural love and affection," etc.

By various conveyances from Mintor, his interest was vested in William Quilter, on August 17, 1889, and that of William Armstrong passed from him by deed to John Remak, on 17th February, 1886.

Ejectment by Remak v. Quilter, brought on September 11, 1895. Verdict for plaintiff. Motion for a new trial.

OPINION OF COURT.

The plaintiff in ejectment, must recover, if at all, upon the goodness of his own title; not upon the badness of the title of the defendant. He claims under a deed from William Armstrong. Armstrong de-

rived his title through the deed of George Stein. George Stein's title rests on the will of Augustus Stein, who devised the premises "to my son Samuel for the term of his life, and after his death to his children and their heirs in equal parts, or, if he should die without issue then to my son George, his heirs and assigns." By this devise, a fee simple was probably conferred upon Samuel. The parties have however agreed that he acquired by it only a life estate. After his death, then his "children and their heirs" took the land. He had no children when the will went into operation or at any later time. The remainder in them was contingent, and the contingent event on which it was to vest never happened. Provision for this eventuality was made in the will. Should Samuel die without children—such we must assume is the meaning here of the phrase "if he should die without issue"—the land was given to George, his heirs and assigns. There are then alternate remainders, to the children of Samuel, and to George. George Stein then acquired the fee under his father's will. But, the event on which his remainder vested, viz. the death of Samuel, childless, happened in 1857. George Stein's deed to Armstrong was made on Sept. 11, 1850, seven years before his estate had vested. Did the remainder to George pass into Armstrong?

In the earlier law, a contingent remainder was not alienable; Hutchin's Wil liams Real Property, 422; Stewart v. Neely, 139 Pa. 309. Equity however recognizes the validity of such conveyances, William's Real Prop. 423. Where the contingency does not affect the person, "but the event, where the person is ascertained who is to take, if the event happens, the remainder may be granted or devised, and the grantee or devisee will come into the place of the grantor or devisor with his chance of having the estate." 2 Washb. Real Prop. 562; Robertson v. Wilson, 38 N. H. 48; 3 Washb. Real Prop. 96. If one not having an interest conveys land with warranty, on the subsequent acquisition of ownership, it inures to his grantee. He is estopped from claiming it. And the estoppel practically carries to the grantee, the subsequently acquired interest. Brown v. McCormick, 6 W. 60. The interest of George Stein has passed to Armstrong. *Prima facie*, therefore, Remak, who has Armstrong's interest, has the right to recover.

But both the plaintiff and the defendant claim under Augustus Stein. If he retained the land until his death, it passed under the devise. If he parted with the land before his death, the ante-mortem alienation prevails over the devise, and one who has derived his title from that alienation has a better right than one who claims under the will. William Quilter is the last grantee in a series of conveyances from Josiah Mintor. Mintor obtained a conveyance in fee, on January 14, 1853, from Samuel Stein. As Samuel Stein died in 1857, the value of these conveyances depends on his having had a fee simple. By the will, he obtained, we are to assume in this case—only a life estate. If he had a fee simple; he procured it from his father, Augustus Stein, by some contract of conveyance *inter vivos*. Was there such a contract or conveyance?

No contract or deed is produced. But Samuel Stein after conveying to Mintor, in 1853, a portion of the tract, in 1856 conveyed the whole of it to Armstrong. The deed to Armstrong recites, that Augustus Stein, "had during his lifetime advanced and transferred the said tract to the said Samuel for natural love and affection." Does this recital dispense with further proof of this supposititious transfer to Samuel?

The recital cannot estop John Remak from denying that transfer. The estoppel of a deed operates only on one party to it, in favor of the other party to it. Strangers cannot be benefitted by it. Sunderlin v. Struthers, 47 Pa. 411; Kirkpatrick v. Heydrick, 161 Pa. 447; Franklin v. Dorland, 28 Cal. 175; Deery v. Cray, 72 U. S. 795; Allen v. Allen, 45 Pa. 468. Remak is a privy of Armstrong, who is the grantee in the deed containing the recital. He might be bound by it towards his grantor, or those claiming by conveyance subsequently from his grantor. But Mintor's deed preceded that to Armstrong. Mintor could not be bound by the latter. Neither can he bind Armstrong or his alienees. Estoppels must be mutual.

But, a recital in a deed is a declaration. Like any other declaration it may be employed by anybody to prove the fact averred in it, against the declarant, or those who are in privity with him. Joeckel v. Easton, 11 Mo. 118; Franklin v. Dorland, 28 Cal. 175; Allen v. Allen, 45 Pa. 468. Samuel Stein, in the deed of 1856 to Armstrong, does declare that to him had been "advanced and transferred" the tract in Augustus Stein's lifetime. Anyone, though stranger to this deed, could employ as against him this declaration as evidence of the fact. Allen v. Allen, 45 Pa. 468. If it can be employed as such evidence, against Armstrong, it is because Armstrong by accepting the deed, is to be supposed to assent to the averments in it. But the slightest reflection shows how artificial this assumption of assent is, and how little trustworthy the assent itself would be. Augustus Stein died in 1847. Whether he had conveyed his land to Samuel, Armstrong could not possibly know. Nor can he be supposed, by accepting the deed, to assert that he knew or even that he believed that there had been such a conveyance. His accepting the deed, would be evidence, of course, that he thought there *might* have been such a conveyance; that he was aware of the existence of a rumor or allegation that there had been such a conveyance. But nothing more. If this deed were his only ground of claim the assertion of a right to the land would be an assertion that there had been a conveyance. But, he already had one title to the land when he accepted the deed from Samuel Stein. He is now claiming the land in virtue of that title. His acceptance of the deed from Samuel is fully explained by his knowledge of the allegation that Samuel had a claim not founded on the will of his father, and by his desire to extinguish an outstanding claim that if it did not impair the one he already had, would cast a cloud on it. This is the utmost that his purchase of the Samuel Stein title, or his acceptance of the deed with the recital signifies. And, this is far from being equivalent to a declaration by *him* that to Samuel Stein *had* "been advanced and transferred" the land. It is only a declaration that it was alleged; that it was possible, that the land had been advanced and transferred. As against Armstrong we do not think that the declaration implied by his acceptance of the deed would be *prima facie* evidence of the advancement and transfer.

But, the plaintiff is not Armstrong but Remak. The deed to Remak does not contain any such averment. Two titles had blended in his grantor, Armstrong, that under the will of Augustus Stein, and that under his supposititious *ante mortem* transfer to Samuel. How intensely artificial the imputation to him of a declaration as to an act that had taken place, if at all, prior to 1857, thirty years before he obtained the conveyance from Armstrong! It is evident that by accepting a deed in 1886, he could not have meant to affirm the truth of the declaration in the deed of 1856. If he is supposed to have bought the land from Armstrong on account of Armstrong's having the Samuel Stein title, the utmost that he can by his act be said certainly to have averred is that he thought there might have been a transfer by Augustus to Samuel Stein, and that it was desirable to acquire what title, if any, Samuel had. Surely a third person, stranger to his deed, and desiring to take advantage of his admissions or declarations from conduct, can extract from his act nothing stronger than this. It is hardly necessary to say that we think this far short of proof of the *fact* of the transfer to Samuel. It must be repeated that there is no estoppel, and that acceptance by Remak of a deed from one in the deed *to* whom there was a recital, must receive as an admission by Remak its natural interpretation.

Let us suppose however, that Remak, by accepting the deed, did aver that over 40 years before, an act had happened of which he could have no knowledge, and that that *averment* would justify reasonable men in believing that the event happened. We say *that averment*, for there is no other evidence of the alleged fact. Is it enough to have thus proved the act of advancing and transfering to Samuel Stein? Can the defendant rest on this fact? We think not. After it is proven that a deed was made, the deed must be produced, or its non-production must be accounted for. In a similar case in which a title by articles of sale was sought to be established by a

recital in a deed, that is by the declaration of the *grantor* himself, concerning his own previous conveyance, in an action by the grantor against others, it is said "The article should have been produced to speak for itself, or its loss accounted for before its contents could be received. There was no attempt to show its actual existence and loss, and without this there was no evidence on which a recovery could legally be had. The plaintiff's admission (*i. e.* his recital) was evidence on the point of the existence of the article as a valid instrument, but this was not enough; its loss and the legal reason for its non-production was wanting." Allen v. Allen, 45 Pa. 468. It was the duty of Quilter, if he wanted to prove his right to hold the land, to prove (1) that there had been a conveyance to Samuel by Augustus Stein; (2) to produce this conveyance, and prove its execution, or identify it with the conveyance referred to in the recital; or, to show a search for it and the inability to find it, and then to show its contents by secondary evidence.

There is, therefore, no sufficient evidence of any conveyance by Augustus Stein to his son Samuel, and all the titles resting on that supposed conveyance fail. Had Remak's title been founded on this conveyance, he could not recover. Under the will of Augustus Stein, and the conveyance from George Stein and his grantee, he is entitled to recover.

A new trial is refused.

HENRY RITCH vs. ISAAC SANDERS.

Trespass.

MARTIN F. DUFFY and SYLVESTER B. SADLER for plaintiff.

The violation of a statute constitutes negligence, creating a liability unless excluded by contributory negligence.—Tobey v. Ry., 33 L. R. A. 496; Ry. v. Voebler, 129 Ill. 540; Van Norden v. Robinson, 45 Hun. 567; Ry. v. Latimer, 128 Ill. 163. Violation of statute is negligence *per se*.—Dahlstrom v. Ry., 108 Mo.. 525; Ry. Co. v. Steigmeir, 118 Ind. 309. There can be a recovery where no bodily injury was inflicted.—Fitzpatrick v. Ry., 12 U. C. Q. B. 645; Purcell v. City Ry. (Minn.), 16 L. R. A. 203; Yeingst v. Ry, 167 Pa. 441. Defendant violated a statute, P. & L. Dig., Vol. 1. p. 2115. The question of proximate cause is for the jury.—Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469; L. V. R. R. v. McKeen, 90 Pa. 122; Raydure v. Knight, 2 W. N. C. 713.

FRANK H. STROUSS and HARRY M. PERSING for defendant.

Where it is alleged that an injury arose from negligence and the intervening agency is manifest, it is not error for the court to withhold the evidence from the jury.—Behling v. Pipe Lines, 160 Pa. 359; West Mahanoy v. Watson, 116 Pa. 344. Injury must be the natural and probable consequence of the negligence.—Pittsburg S. R. Co. v. Taylor, 104 Pa. 315. Mere fright is no cause of action.—Ewing *et. ux.* v. Pittsburgh C. & C. & St. Louis Ry. Co., 147 Pa 40; Fox v. Borkey, 126 Pa. 114.

STATEMENT OF THE CASE.

Sanders on the 3d day of April, 1890, discharged a rifle from his yard in the Borough of Mt. Holly Springs across an adjacent common, on which Ritch not more than 20 yards off was walking, and in the direction of Ritch. Ritch became terrified and excited, and symptoms of mania followed after three days, and have continued to the present time. This action is brought against Sanders to recover damages for the injury arising from his reckless and negligent conduct. The damages assessed are $4,000. At the trial the court reserved the point of law whether on the facts alleged by the plaintiff and supported by the evidence, there could be a recovery.

OPINION OF THE COURT.

The counsel for the defendant frankly concedes that his conduct was reckless and negligent, as in fact it was. Ritch but 20 yards off, was walking across the common, and Sanders discharged his gun towards him. Besides being reckless, the act was prohibited by the statute of February 9, 1751, 1 Sm. L. 208, which makes it a misdemeanor for any person in any borough of the province to "fire any gun or fire-arm." This statute does not seem to have been repealed, and it cannot otherwise become obsolete. Homer v. Commonwealth, 15 W. N. C. 337. A later act, that of May 8, 1876, 1 P. & L. 1162, declares that discharging a gun "at any other person" shall be a misdemeanor. Both of these acts are based on the danger to persons in more or less populous places from the discharge of fire-arms. The last is founded on the policy not merely of preventing the injury from the impact or penetration of the bullets that may be discharged, but of preventing the alarm to which the pointing of a gun towards an-

other gives rise. To point a gun in the direction of another, and discharge it, is fitted to intimidate persons of more than ordinary firmness of nerve, and, when no special facts exist, affording a justification for it, is exceedingly reprehensible.

The mania of the plaintiff is the result of the firing of the gun through the fear which it engendered. Non-responsibility for the result may be alleged, on two separate grounds, (1) that no result mediated by fear is actionable; (2) that this particular result was so unusual and improbable that it would be improper to visit responsibility for it on Sanders.

(1) Fear was the medium through which the mania was produced. There are several cases that hold that the fear itself, considered as an effect, is not a cause of action. On the other hand numerous cases maintain responsibility for effects produced by the fear. In most of them the fear has been that of a horse. Bitting v. Maxatawney, 177 Pa 213; Baker v. North East Borough, 151 Pa. 234; Pittsburg, etc. Railway v. Taylor, 104 Pa. 306; Mechesney v. Unity Township, 164 Pa. 358; Wellman v. Borough of Susquehanna Depot, 167 Pa. 239; McDonald v. Snelling, 96 Mass. 290; Yingst v. Lebanon, etc. Railway Co., 167 Pa. 437. In all these cases the fright induced the disordered and uncontrollable actions of the horse, which resulted in damage either to him (Hey v. Philadelphia, 81 Pa. 44) or to the vehicle, or to the persons in it. But it is impossible to see why if results wrought by means of fear, through the voluntary muscles of the horse, are actionable, results wrought by fear, independent of these muscles, should not be. In Conklin v. Thompson, 29 Barb. 218, the death of a horse from fright, caused by the explosion of a fire-cracker, was a ground for the recovery of damages from the person that threw the cracker. It is difficult to discover why an injury wrought through the fright of a horse, should be actionable and that wrought through the fear of a man not. The celebrated Squib case, Scott v. Shepherd, 2 Black. 892, implies that if A causes B, through sudden fear of injury to himself, to hurl the squib so that it strike C, A is liable to C for the injury.

It is a little remarkable however that ome doubt exists whether if the fear works injury to the individual that suffers it, otherwise than through his voluntary muscles, it is a cause of action. If a child were frightened by X, and impelled by the fright, fled over a precipice or into a stream, it would be singular if the actor could escape responsibility, because the death resulted through fear operating on the muscles of the child. But, suppose the fear operates upon the organism directly? Is there to be no responsibility for it?

In Mitchell v. Rochester Railway Co. 151 N. Y. 107, after stating that fright alone is no ground for damages, the court says: "If it be admitted that no recovery can be had for fright, occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is *obvious* that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle." This sentence seems to postulate the principle, that no effect can be actionable, unless all the causes of it are actionable. Slight reflection is enough to show the erroneousness of such a principle. If the mental misapprehension, caused by a fraudulent representation or device, is not actionable *per se.*, are we to say that the detrimental action to which it leads is not actionable? If A's command to B to commit a tort will *ipso facto* support no action for damages, are we to conclude that the tort committed by B. in pursuance of it, will support no such action against A? In the cases cited *supra*, the fear of the horse would have been no cause of action. Did it follow that the consequences of that fear had the same immunity?

A for us more serious authority however, is Ewing v. P. C. etc. Railway Co., 147 Pa. 40. A car was negligently derailed and thrust against a house in which the plaintiff was. She was thus subjected to great fright, became sick and disabled, and continued thus sick and disabled. A demurrer to the declaration was sustained by the common pleas, and by the supreme court. The latter court say "there was no allegation that she had received any bodily

injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as accident cases will be very greatly enlarged." In this, it seems to be assumed that the plaintiff complained merely of the fright. But, in other places of the opinion, a resulting "permanent injury" is spoken of. Perhaps the fault with the plaintiff's declaration was that it did not indicate any specific physical injury. Several of the authorities cited, simply deny the actionability of fear, "unaccompanied by an injury to the person" or "when the unlawful act complained of causes that alone." We are unable to infer from anything that is said, that for a permanent mania produced by the fear the tortious production of the fear would not have involved responsibility. The want of proximateness of the permanent injury, seems at least as much to have induced the decision as the hypothetical immunity of an act from liability for the organic consequences of fear. In Benner v. Canfield, 36 Minn. 90, it was held that the defendant was not liable for the miscarriage of a woman caused by her fright at the shooting of a dog near her, because it was not a consequence which the defendant ought to have foreseen. There are on the other hand respectable authorities which hold that "the true question would seem to be whether the fear in which the plaintiff was put by the defendant's wrongful or negligent conduct was such as in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and probably lead in the plaintiff's case to the physical effects complained of. Fear, taken alone falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects. Pollock Torts, Ed. 1894, p. 57. In Oliver v. La Valle, 36 Wis. 596; Fitzpatrick Railway, 12 U. C. Q. B. 645; Purell v. St. Paul, etc. R. R. Co. 16 L. R. A. 203, a miscarriage caused by terror was held a cause of action, as in Railway v. Lattimer, 128 Ill. 163, was heart disease. In Buchanan v. West Jersey R. R. Co., 52 N. J., a woman, on a platform, to avoid being struck by a timber projecting over it from a passing car, threw herself upon the floor. By reason of the shock to her nervous system, occasioned by the peril, her health was seriously impaired. The plaintiff having obtained a verdict, the court, Beasley, C. J., refused a new trial, saying however that it expressed no opinion whether mere fright resulting in sickness is actionable.

(2.) Is the consequence too remote to be within contemplation of a reasonable man? That Sanders did not anticipate the result is irrelevant. "For the purpose of fixing liability for a tort, no inquiry is permitted into what he (the defendant) did or did not anticipate." Sedgwick, Damages, 53; Pittsburg v. Grier, 22 Pa. 54. The act of Sanders was not one of negligence. He did not, in aiming at legitimate results, produce others that were not foreseen. He intended to fire the gun in the direction of Ritch, and apparently for the purpose of alarming him, and he accomplished what he intended. He was bound to know that his act would probably excite great terror, and that the gravest results might flow from that terror. It is entirely immaterial whether he thought that insanity or other permanent injury would follow. His act was illegitimate, and for its consequence he must be answerable.

Judgment on the verdict.

ARTHUR FREEMAN vs. ISAAC WALTON.

Trespass.

ISAIAH SHEELINE and ARTHUR M. DEVALL for plaintiff.

1. Salisbury v. Herchenroder, 106 Mass. 458; Billings v. Breining, 45 Mich. 65; McGrath v. N. Y. C. & H. R. R. R. Co., 63 N. Y. 522; Briggs v. N. Y. etc., R. R., 72 N. Y. 26; Knupple v. Knickerbocker Ice Co., 84 N. Y. 488; Hanlon v. South Boston R. R. Co., 129 Mass. 310; Lederman *et. ux.* v. Penna. R. R. Co., 165 Pa. 118; Davidson v. Traction Co., 4 Pa. Sup. Ct. 86.

2. Shapleigh v. Wyman, 134 Mass. 118; Schwartz v. Brahm, 130 Pa. 411; Schmidt v. McGill, 120 Pa. 405; Murphy v. Orr, 96 N. Y. 14; Moebus v. Hermann, 108 N. Y. 350.

MILES H. MURR and JOHN G. MILLER for defendant.

Violation of ordinance is not evidence of negligence *per se*. Knupple v. Knicker-

bocker Ice Co., 84 N. Y. 488; Footman's right of way at a street crossing is not superior to that of vehicles. Baker v. Savage and Gormley, 45 N. Y. 191; Betton v. Baxter *et al.* 54 N. Y. 245. As to whether driving at a certain rate of speed is negligence, is for the jury. Bour v. Plank R. R. Co., 101 Pa. 334; McCully v. Clark, 4 Wright 406.

STATEMENT OF THE CASE.

Isaac Walton resided in the borough of Tompkinsville, in a house with three stories On 3rd March, 1896, he made a business trip in a buggy to a point about three miles from his home. He left his wife and a young child, both very sick, in a room on the second story of the house. They were unable to walk. When, on his return, he was about ¼ mile from his house, he heard that it was afire. Excitement and terror seized him. Lashing his horse violently, it ran at the rate of 10 miles an hour through the principal street of the town. At a crossing he ran into the plaintiff, Freeman, inflicting a lasting damage. This collision occurred 40 seconds after he received tidings of the condition of his house. There was an ordinance of the borough that forbade driving through the principal street at a rate greater than 5 miles an hour.

CHARGE OF THE COURT.

Gentlemen of the Jury:

The plaintiff requests us to give you several instructions. He desires that we should say that the breach of the ordinance was conclusive of negligence by the defendant. The cases are numerous which hold that when ordinances made to protect citizens from accident, are violated, the violation is evidence of negligence. Thus, the transgression of an ordinance regulating the speed of cars, Hanlon v. South Boston Horse R. R. Co., 129 Mass. 310; Lederman v. R. R., 165 Pa. 118; Pennsylvania Co. v. James, 81½ Pa. 194; of an ordinance requiring a railroad Co., to maintain a flagman at street crossings, McGrath v. N. Y. etc., R. R. Co., 63 N. Y. 522; of an ordinance forbidding allowing stove pipes to project without the building, Briggs v. N. Y. etc. R. R. Co., 72 N. Y. 26; of an ordinance forbidding leaving horses in the street unhitched, Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488, has been deemed evidence of negligence. Precisely why, does not distinctly appear. The ordinance cannot make the act negligent, which is not such, Phila. & Reading R. R. v. Ervin, 89 Pa. 71; Phila. & Reading R. R. v. Boyer, 97 Pa. 91; Davidson v. Traction Co., 4 Sup. C., 86. In Phila. & Reading R. R. v. Ervin, 89 Pa. 71, the relevancy of the ordinance is said to consist in its inducing less vigilance on the part of the plaintiff, who with reason, assumes that the defendant will not ignore it. It can scarcely be thought that the ordinance is admissible as expressive of the opinion of the law making power, as to what careful and prudent conduct is. At all events, the proof of the ordinance is admissible. But, it is not conclusive. Cases *supra*. You may consider the ordinance with the other facts, in determining whether Walton was negligent, in driving at the rate of ten miles per hour, through the chief street of the borough of Tompkinsville. You must not determine that that rate was negligent, simply because it exceeded the rate of five miles prescribed as the maximum by the municipal regulation.

The plaintiff further desires us to inform you that the speed to be observed at a crossing, must be regulated not by the necessities of the defendant, but by a consideration of the danger to others using the street. It is almost aphoristic to say that persons driving horses and vehicles through the streets, must take heed to the risks to persons crossing the street, even elsewhere than at the crossings. Moebus v. Herrman, 108 N. Y. 349; *a fortiori* at the crossings, Murphy v. Orr, 96 N. Y. 14; Schwartz v. Brahm, 130 Pa. 411; Schmidt v. McGill, 120 Pa. 405. Even the ordinary rate of a horse-car "ought to be checked at every street crossing, especially after dark." West Philadelphia, etc. Railway v. Mulhair, 6 W. N. C. 507. If the speed of 10 miles an hour exceeds that which comports with a prudent and careful regard of the safety of pedestrians using the street, it will be your duty to render a verdict for the plaintiff unless the matters now to be considered are countervailing.

The same external act, under the same external circumstances, may be negligent or not, according to the subjective condition of the actor, *Eg.* The heedlessness of a very young child will not be imputed to it as negligence, while a similar state

in an adult will. Summers v. Brewing Co., 143 Pa. 114. This is one of the exceptions to the principle that the standard of the duty of care does not vary with individual ability. Pollock Torts, Ed. 1894, p. 540. In sudden and critical danger the mind is not able to exercise its usual circumspection, and the absence of the circumspection is not then negligence. A man in the face of grave peril is not negligent because the same acts in the absence of such peril would be rash and ill-advised. Brown v. French, 104 Pa. 604. This principle is frequently applied when the attempt of a defendant, in an action against him for his negligence, is to fasten on the plaintiff the charge of having contributed to the injury by his own negligence Sprouls v. Morris Township, 179 Pa. 219; Vallo v. U. S. Express Co., 147 Pa. 404; Baker v. North East Borough, 151 Pa. 234; Stoughton v. Manuf. Nat. Gas Co., 159 Pa. 64.

The cases are not so numerous in which the peril of the defendant is held to take from his acts, the character of negligence as being which in ordinary circumstances they would be justly stigmatized. The Squib case, Scott v. Shepherd, 2 Blacks. 892, 1 Smith's L. C. 737, is a famous specimen of this class. A majority of the judges there decided that when A threw a lighted squib into a market house, which lighted on B's stall, and B threw it impulsively on C's stall, and C threw it and struck D in the eye, B and C were not responsible, but only A. In Donahue v. Kelley, 181 Pa. 93, the defendant who, attempting to carry out of the house a burning gasoline lamp, and being burned by the fluid escaping from the lamp, hurled it through the room toward the door in such a way that it exploded and scattered the burning gasoline over the plaintiff was not to be adjudged negligent by the standard of care that would have been applicable under less urgent circumstances. *Cf.* Floyd v. Phila. &. Read. R. R. Co., 162 Pa. 29; Sekerak v. Jutt, 153 Pa. 117.

A man has no right deliberately to relieve himself of a hurt at the expense of his neighbor. He cannot, *e. g.* save his structure from injury by water that has accumulated on his premises by conducting it on the land of his neighbor. Whalley v. L. & Y. Railroad Co., 13 Q. B. D. 131. Walton had no right wilfully to run over Freeman in order to save his house, his wife, or his child from damage however grave. We think however that he is liable not for the collision, but for the negligent causation of the collision, and in determining whether he was negligent, in fast driving, regard may be had to the recency of his information concerning the condition of his house, the excitement produced by it, and the effect of that excitement on his actions. If the ordinarily careful man, under the circumstances would have been excited to the same degree and would have driven at the same rate, the act is not to be adjudged negligent. No allowance is however to be made for his idiosyncracies. Nature has not conferred on all men the faculties that, together, constitute care, memory, imagination, quickness of thought, imperturbableness, control over the muscles, the power of appreciating the adaptedness of the act done to the end that ought to be accomplished. But the law does not permit them to transfer to others, the hurt or damage which these defects of constitution occasion. Society is not a mutual insurance company and the apostolic maxim "bear ye one anothers' burdens" is not a maxim of Anglo-American jurisprudence. If the ordinarily self-possessed and careful man would not have driven at the speed of 10 miles an hour, the peril to house, child and wife, which Walter was attempting to avert was no excuse from the consequences of that speed. The second request of the plaintiff we therefore adopt, with the addition that if the ordinarily prudent and careful man would have adopted the speed of 10 miles an hour under the circumstances, the adoption of it is not imputable to Walter as negligence, and for its consequences he is not responsible.

The defendant contends that the plaintiff has not shown that he acted carefully in crossing the street, and that had he so acted, the accident would not have happened. There are states in which it is incumbent on him to show that he exercised care. In Pennsylvania, no one is presumed to have been careless. The plaintiff must prove the carelessness of the defendant. The defendant must

prove the contributory carelessness of the plaintiff unless the plaintiff himself proves it. Bradwell v. Railway Co., 139 Pa. 404. In the absence of evidence, the law presumes that the plaintiff did all the acts required of a prudent man; Schum v. Pa. R. R., 107 Pa. 8; Pollock Torts, Ed. 1894, p. 548. It is true, that there are cases in which the occurrence which is the ground of the plaintiff's claim, is held to imply a want of care on his part. *Res ipsa loquitur.* Thus if one is struck by a locomotive, in crossing a track, the accident itself is said to prove that he must either have neglected to stop, look, and listen, or have risked crossing it, despite his knowledge of the approach of the train. But while with respect to crossings over railroads, the courts have devised the principle that the traveler must stop, look, and listen, there is no such legal duty on the part of a pedestrian about to cross a street with respect to ordinary vehicles. Schmidt v. McGill, 120 Pa. 405; Moebus v. Herrman, 108 N. Y. 349; Shapleigh v. Wyman, 134 Mass. 118; Schienfeldt v. Norris, 115 Mass. 17; Bowser v. Wellington, 126 Mass. 391. And the fact that a passenger is run into by a horse and wagon is not *ipso facto*, evidence that he was negligent. The horse is, ordinarily, under control. The pedestrian has a right to assume that he will be seen, and that the driver will either slacken his pace, or turn sufficiently to avoid striking him. He is not absolved from the exercise of care, but care cannot be rigorously and inflexibly defined in his case, as respects the horse and wagon, as with regard to cars impelled by steam. It is not the duty of a pedestrian to anticipate recklessness or carelessness on the part of those who are driving on the streets. Pollock, Torts, Ed. 1894, p. 591. In our opinion, there is an entire absence of evidence which could legitimate the imputation of negligence to the plaintiff.

SAMUEL BURKE vs. JOHN LOOMIS.

Assumpsit.

LLEWELLYN HILDRETH and ALBERT T. MORGAN for plaintiff.

From an acknowledgment of a debt, the law implies a promise to pay it. Trickett on Limitations, p. 307; Palmer v. Gillespie, 95 Pa. 340. The amount of the debt need not be stated. Hazelbaker v. Reeves, 12 Pa. 264; Davis v. Steiner, 14 Pa. 275. Payment of interest or part payment of note is sufficient acknowledgment. Barkley's Appeal, 64 Pa. 69; Adams v. Seitzinger, 1 W. & S. 244; Sigourney v. Drury, 14 Pick. (Mass.) 387; James v. Moore, 5 Binney, 573.

CLEON N. BERNTHEIZEL and ELI SALISBURY for defendant.

The acknowledgment of a debt must refer plainly to the very debt to whose exemption from the statutory bar it is sought to be applied. Shaffer v. Shaffer, 41 Pa. 51; Burr v. Burr, 26 Pa. 284. The acknowledgment from which the promise is inferred must be consistent with a promise to pay. Senseman v. Hershman, etc., 82 Pa. 83; Bailey v. Bailey, 14 S. & R. 194.

STATEMENT OF THE CASE.

Loomis on 3d March, 1877, made a note payable five years after date to Burke for $572. A series of payments, 20 in number, by Loomis, was made during 1882–1894, amounting altogether to $213, none of the payments being more than enough at the time it was made to pay the then accrued interest. When the last payment was made Loomis said to Burke, "I don't expect to pay you anything more." In March, 1895, he, however, paid $11 to Burke on account of indebtedness. At that time Burke held a second note against him for $300, made on 7th June, 1892, and payable one year from date. There remains due on the note of 3d March, 1877, the principal, $200 of interest down to March 3d, 1894, and all the interest from 1894 to the present time.

Defendant pleads the statute of limitations.

OPINION OF THE COURT.

In March, 1895, Burke held two notes of Loomis', one dated 3d March, 1877, and payable five years thereafter and the other 3d June, 1892, payable one year from its date. The payment of $11 made by Loomis at that time, was "on account of indebtedness." The debtor did not specify the debt. While he admitted some debt, the admission would be satisfied by the debt of 1892 as well as by that of 1877. Such an admission is not sufficient to toll the statute of limitations with respect to the debt of 1877. Burr v. Burr, 26 Pa. 284;

Landis v. Roth, 109 Pa. 621, Limitations, 355.

In 1894 a payment was made. Its amount is unknown. It was less however than the interest then due. Does this payment so acknowledge the note in suit, as to exempt it from the bar of the statute? We think not, and for two reasons. (1.) In the first place, it has the same defect, from this point of view, as the payment of March, 1895. There were then two debts due, and there is no evidence to which of them Loomis intended it to be applied. We may infer that Burke applied it to the note of 1877, Watt v. Hoch, 25 Pa. 411; but his application of it, not concurred in by Loomis, could "not take the debt out of the statute as to the balance," Tiedeman Sales, 212. (2.) In the second place, the payment of 1894 was accompanied by the declaration "I don't expect to pay you anything more." A payment is an acknowledgment of the debt. But, the acknowledgment does not *ipso facto* toll the bar of the statute. It produces this effect, only through the promise to pay the debt which is inferred from the acknowledgment, when the inference is not by some other fact repelled. When words or acts accompanying the acknowledgment are inconsistent with the purpose to pay the debt in the future, the acknowledgment will not toll the statute. Heany v. Schwartz, 155 Pa. 154; Limitations, 311 *et seq.* The payment of 1895 does acknowledge the debt, to the extent of the payment, but the words "I don't expect to pay you anything more" indicates a denial that any debt would remain to be paid, or at least, a purpose not to pay it.

Do any of the prior payments toll the statute? Twenty payments in all were made prior to 1895. Of these we have already considered the last made in 1894. The times at which the other nineteen were made do not appear from the evidence. If any of them had been made in 1892, or 1891, it would have exempted the debt from the bar of the statute of limitations. But, a payment made before 1891 could not have this effect, the action having been brought in the beginning of 1897. When a debt is *prima facie* barred, it is incumbent on the plaintiff to establish the facts that will remove this bar. If payment is relied on, the fact, the time, of the payment of the debt to which it is applied must be shown. There is then nothing in this case to relieve the plaintiff's claim from the prohibition against enforcement, offered by the statute of limitations. Your verdict, therefore, gentlemen of the jury, must be for the defendant.

SAMUEL ROSE vs. AHAB WALKER.

Assumpsit.

CHAS. R. WEEKS and ADAIR HERMAN for plaintiff.

A principal is not liable for a fraudulent representation by an agent beyond the apparent scope of his authority. Atlas Mining Co. v. Johnston, 23 Mich. 36; White v. Cooper, 3 Barr 130; Hirshfield v. Waldron, 54 Mich. 649; Mackintosh v. Eliot Nat. Bank, 123 Mass. 393. The third party must use reasonable diligence to guard against any fraudulent acts of the agent. Chase v. Buhl Iron Works, 55 Mich. 139; Rice v. Peninsular Club, 52 Mich. 87.

J. PERRY WOOD and J. THOMPSON CALDWELL for defendant.

The authority of an alleged agent may be established by the circumstances of the case. Woodwell v. Brown, 5 Pa. 333. The possession of the note by an agent implies authority to receive payment. Higgins v. Moore, 34 N. Y. 417; Law v. Stokes, 32 N. J. L. 249; Butler v. Dorman, 68 Mo. 298. Payment to a thief will discharge the maker if made without knowledge of the theft and with reasonable prudence. Byles on Bills, 5 Ed. pg. 351. Plaintiff's negligence invited the forgery, Young v. Grote, 4 Bing. 253; Byles on Bills, 5 Ed. pg. 490.

STATEMENT OF THE CASE.

Rose, on the 7th March, 1892, loaned $1,000 to Walker, receiving from Walker a note under seal for that sum, payable in one year from date, with 7 per cent. interest. Rose, who was crippled and partially blind, employed his son Charles to attend to many matters of business. He never, however, allowed him to make collections except on his written authority. Rose's notes and securities were kept in a tin box in the house, which was ordinarily not locked, and the key of which Samuel Rose carried. On Aug. 13th, '93, the Walker note not being paid, Rose requested his son to call on Walker and ascertain when he would be ready to pay it. The son,

Charles, without Samuel Rose's knowledge, went upstairs to the box, opened it, and took from it the Walker note. He also wrote the following:

"MR. AHAB WALKER,
Dear Sir:—I send my son, Charles, with your note for $1,000. I am anxious to receive the money and interest, and shall be obliged if you will pay them to him.
Truly yours,
SAMUEL ROSE."

The body of the note was written in the style of letter ordinarily made by Charles, but the words Samuel Rose very skillfully imitated the usual signature of Samuel Rose, which was well known to Walker. The imitation indeed was so close that it might have imposed on a very sagacious and experienced judge of handwriting. The money, $1,061, was paid by Walker, and the note with the above order were left with him. When the son returned he informed his father that Walker had declined to pay the note. He drew up another note in the exact form of the Walker note, wrote the name of Ahab Walker to it, and placed it in the tin box. After some weeks, Samuel Rose, assuming that the note was unpaid, sent for an attorney, and producing the forged Walker note, delivered it to him with a request that he sue it out. This action of assumpsit declaring on the note of 7th March, 1892, is the consequence.

When the plaintiff put the note in evidence, its execution was duly proved by the plaintiff and his son Charles. In defense, the defendant proved that it was a forgery, and produced the genuine note. Plaintiff convinced, stated to the court that that was the note on which he should insist on recovering. He proved that his son had delivered it to defendant under the circumstances above recited. The court directed a verdict for defendant.

Motion for new trial.

OPINION OF COURT.

Ahab Walker resists the demand of Samuel Rose on the ground that he has already paid the note on which the suit is brought. He has in fact paid it. But he has paid it, not to Samuel Rose, but to Charles Rose. It needs no authority to justify the assertion that a payment to Charles has not the legal consequence of a payment to Samuel Rose, unless in some way Charles was for the purpose of receiving payment the agent of Samuel.

Charles pretended to Walker to be the agent of Samuel. But an agency can neither be created nor proved by the declaration of the pretending agent made to the person with whom he deals or to others. Neither can his act, as agent, prove the agency. "It is the conduct of the principal, and not of the agent, from which authority must be inferred." Huffcut, Agency, 142, 143. Did Samuel constitute Charles his agent to receive payment from Walker? He did not. He simply requested Charles to call on Walker and ascertain when Walker would be able to pay it. This is far from being an authority to carry the note to Walker, to deliver it to him and to receive the money due upon it.

But, a man may by a course of conduct estop himself from denying as against X, that one with whom X has dealt as agent was in fact such. We must then inquire whether the facts of this case estop Samuel Rose from denying, as against Walker, the authority of Charles Rose.

The relation of father to Charles, it need scarcely be said, does not preclude the denial of this authority by Samuel Rose. But Charles had attended to many matters of business. If these had been with Walker, and had included receipt of payment of notes, Walker might have been justified in assuming that the authority to receive payment of the note in suit existed in Charles. But, neither the kind of affairs performed by Charles, nor any participation therein of Walker appears. On the contrary it distinctly appears that the plaintiff never allowed his son to make collections except on written authority. We are to presume, in the absence of evidence to the contrary, that Charles never did make collections except under written authority. It is not apparent whether Walker was aware of the previous collections made by Charles; but, if he was, we must assume that he was also aware that each of them was made under a special written delegation from the plaintiff to make it. He knew then, that there was no general authority to collect; that for each collection there had been particular deputation, and that each particular deputation had been in writing.

Walker then knew from the previous conduct of the plaintiff, as he would know independently of such conduct, that Charles had no power to receive the money unless he had been specially authorized. When he took Charles' word that he had the authority, he acted at his peril. It matters not whether the word was oral or written, nor whether it pretended to be Charles' or Samuel's word. It was in fact Charles', Samuel is not responsible for it. It was a forged power of attorney for the imposition by means of which no consequences can fall on Samuel. Penna. Co. v. Franklin Fire Ins. Co., 181 Pa. 40. That the forgery was skillfully executed, so skillfully as to elude the experts, can surely not make Samuel chargeable with its results. Is he to be blamed for permitting his son to become familiar enough with his handwriting to imitate it, or to acquire skill enough to imitate it?

But Charles' possession, at the interview with Walker, of the note, tended to authenticate Charles' pretension that he had been sent by his father to collect it. Is his father, however, responsible for that? He did not give the note to Charles; he did not intend Charles to have it; he was not aware that Charles had it. If he is to be charged with the act of Charles, it must be because he did not keep his tin box locked, or adopt some other precaution against access to its contents. But is a man obliged to suspect that his son will act improperly with respect to his securities, and to prohibit his getting them into his hands? And if he does not, and the son acts, as in this case, is he then to be compelled to bear the consequences? However negligent, as to strangers, the leaving of the securities in an unlocked box may have been, it was surely not negligence, as to the son. The father is not required to suspect his son,—in the absence of previous indications of depravity, of being a rogue or a thief. In Penna. Co. v. Franklin Ins. Co., 181 Pa. 40. Baker had given the key of the box in which his securities were to his son. He had authorized him to collect the income from many of these securities. The son possessed himself of some of these securities, certificates of stock in an insurance company, forged a power of attorney in his father's name to make a transfer of them; transferred them, and caused the insurance company to cancel the old and issue a new certificate to the transferee. The company was held liable to the father. *Cf.* Hill v. Jewett Publishing Co., 154 Mass. 172; Merchants of the Staple of London v. Bank of England, 21 Q. B. D. 160; Bank of Ireland v. Trustees of Evans Charities, 5 H. L. C. 389. The doctrine of these English cases is, that although the plaintiff may have been negligent, and but for his negligence the defendant would not have been imposed on, yet the plaintiff will not be chargeable with this result unless the negligence was the proximate cause of the imposition. Merely leaving the seal of a corporation unguarded, in the custody of a clerk does not make the corporation liable for his fraudulent application of it to what purported to be its power of attorney. We are not able to see any negligence of Samuel Rose at all, so far as the deplorable result of the dishonesty of his son is concerned. It was not negligence to have occasionally employed him to make collections under a written power. It was not negligence to have sent him with the message to Walker. It was not negligence to have omitted precautions against a roguish use of his securities by his son. The loss of the defendant is the consequence of the falsehood, the forgery, and the unauthorized possession of the note by Charles. His acts cannot be imputed to his father. Walker owed the note to the plaintiff. It is his misfortune that he paid it to Charles Rose, under the mistaken supposition that he was directed by Samuel Rose to do so. For the mistake Samuel cannot be deprived of the money due him. The court was in error in directing a verdict for the defendant. It should have directed a verdict for the plaintiff. The rule for a new trial is therefore made absolute.

SARAH JANE KAHL vs. ZWENGLI KAHL.

Feigned issue.

G. FRANK WETZEL and FRANK J. LAUBENSTEIN for T. F. Brungart.

The property is subject to both executions.—Watmough v. Francis, 7 Pa 206. Sale after return day is valid.—3 Liens 507. Executions delayed by permissive or collusive assent or by gross laches, lose their priority.—Earl's Appeal, 13 Pa. 483; Schuylkill Co.'s Appeal, 30 Pa. 358; Wier v. Hale, 3 W. & S. 285.

CHARLES S. SHALTERS and CLARENCE R. GILLILAND for Sarah Jane Kahl.

Sale may be made after the return day.

St. Bartholomew's Church v. Wood, 61 Pa. 96; 3 Liens 507. The lien of the levy is not lost by the delay of the sheriff.—Electric Co.'s Appeal, 180 Pa. 150. The proceeds go to the first execution-creditor.—Shafner v. Gilmore, 3 W. & S. 438. It would have been irregular to issue an *alias fi. fa.*—Pott's Appeal, 20 Pa. 255. And it was unnecessary to pay any money into court.—McDonald v. Todd, 1 Grant's Cases 17.

OPINION OF THE COURT.

On March 1st, 1895, P. F. Brungart obtained a judgment for $350 against Zwingli Kahl and J. Adam Kahl. Sarah Jane Kahl obtained a judgment against Zwingli Kahl, who was her husband, on Jan. 17th, 1897, for $1800. On this judgment she issued an execution to May term 1897, and a levy was at once made thereon, on Feb. 11th, 1897, upon all the personal property of Zwingli Kahl. The May term ended on May 17th, 1897. On May 27th, 1897, Brungart issued an execution to the September term and directed the sheriff to proceed at once. On June 11th, 1897, the sheriff sold the personalty of Zwingli Kahl under the execution levied on the Sarah J. Kahl judgment, she becoming the purchaser. He made no levy under the Brungart *fi. fa.*, nor did he sell upon it. Although Mrs Kahl paid no money to the sheriff, insisting on crediting on her judgment, the amount bid by her, the court is to consider the money in court, and is to determine whether Mrs. Kahl or P. F. Brungart is entitled to it.

Judgments do not become leins upon personalty, but executions do. And they rank as liens, not according to the age of the judgments on which they are founded, but according to the order in which they reach the hands of the sheriff. 1 Liens, 324; 3 Liens, 499. The money made on a sale under both is to be applied, first, to the earlier, and then to the later *fi. fa.* The Sarah J. Kahl *fi. fa.*, was the first in the sheriff's hands and it was promptly levied. But the sale did not take place until June 11, 1897, which was after the return day of the writ. It is well settled however, that the lien of the *fi. fa.*, is not lost, because of a delay beyond the return day in making the sale, if a levy was made before the return day. 1 Liens, 341; 3 Liens, 507.

Four months elapsed between the levy on the *fi. fa.* and the sale. Does this delay *per se* impair the lien of the *fi. fa.*? If it was the result of the sheriff's tardiness or neglect, it would not have that effect. 1 Leins, 354; Keller v. Beishline, 1 C. C. 287; Gillespie v. Keating, 180 Pa. 150; McGinnes v. Prieson, 85 Pa. 116; Broadhead v. Cornman, 171 Pa. 322.

The plaintiff, Mrs. Kahl, was the wife of the defendant, and it is urged that her evident object in issuing the execution, was not to sell the goods of her husband, but to impose a lien on them, that, should any other person issue a *fi. fa.* would secure to her the proceeds of a sale. It is entirely clear that one who issues an execution with the intent that it shall not be executed in due course, and who manifests this intent by suggestion or direction to the sheriff, postpones himself to other intervening executions. 1 Liens, 343; 3 Liens, 505. But he must both have and express to the sheriff this intent. What is the evidence of such intent on the part of Mrs. Kahl? The writ is itself a command to the sheriff to make the money. There is no express evidence that any contradictory direction to that officer accompanied it. We might surmise that the wife was not anxious for a sale of her husband's property, but she cannot be deprived of her priority, on account of a suspicion that she had given secret monition to the sheriff not to be too hasty. Perhaps her inaction, during the four months, gives an appreciable strength to that suspicion, but it still remains, we think, too feeble to justify the postponement of the execution. If the sheriff's delay is caused by the acts of the plaintiff he may lose his priority. 1 Liens, 347; but the "sheriff's procrastination, even with the sufferance of the creditor, it has been said, will not postpone an execution to later ones which are executed more expeditiously." 1 Liens, 354. We are unable to infer from the interval of four months between levy and sale, and from the wifehood of the plaintiff, that that delay was due to a secret direction from her.

But, thus to decide is, we think, unnecessary to justify the appropriation of the sheriff's sale to Mrs. Kahl's *fi. fa.* That *fi. fa.* gave authority to make the sale. The sale was made under it. The money thus produced is payable to Mrs. Kahl, unless some one has a superior right. Mr. Brungart has such right, if it all, only because the sale was made by his writ, as well as by that of Mrs. Kahl. Nothing is better settled than that no creditor can share in the product of an execution sale, unless *his* execution was one of the instruments of the sale. Even an earlier *fi. fa*, loses a right to participate in the proceeds of the sale, if no levy was made on it, and the sale did not take place upon it. 3 Liens, 508; 1 Liens, 356. It is quite clear then, that if no levy and sale take place on the later *fi. fa.* it could not take the proceeds of a sale made on the earlier. Were this not clear, it would be manifest that such *fi. fa.* could not take the money in preference to the earlier. No levy was made under the Brungart *fi. fa.* and the sale did not take place upon it. He therefore has no *locus standi* to object to the appropriation of the money to Mrs. Kahl. The money will therefore be paid to her.